

REVIEVED BY T. Hanes DATE 10/22/86PDR 1. ENDOWMENT DATE 10/22/86 U.S. INTERESTS IN RATIFYING  
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ADDITIONAL PROTOCOL IICONFIDENTIAL**EXCISE**

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SUMMARY STATEMENT OF  
U.S. INTERESTS IN RATIFYING  
ADDITIONAL PROTOCOL II

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*✓ in part*

ANALYSIS: U.S. ratification of Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America would materially improve the prospects for the Treaty's success. This is believed to be in our national security interest since:

1. The Treaty includes an undertaking by the Latin American parties to prevent the type of deployment of nuclear weapons in Latin America that occurred in the Cuban missile crisis and provides for verification of compliance with this undertaking not only by the parties themselves, but by a regional organization that has now been established. It is to our advantage to reduce the chances of such deployment, which could upset stability in this hemisphere and add to the number of locations and directions, and in some cases decrease the distance, from which nuclear attacks could be launched against us.

2. The Treaty complements our efforts to prevent the proliferation of nuclear weapons in the following respects:

(a) The Treaty is already in force for eight states that have not yet ratified the NPT\* and has been signed by (but has not entered into force for) three states which have not yet signed the NPT.\*\*

\* Barbados, Bolivia, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and Uruguay. (For Nicaragua's statement on peaceful nuclear explosions, see pp. 8-9 of Background Memorandum.)

\*\* Argentina, Brazil and Chile. (For statements of the first two on peaceful nuclear explosions, see pp. 8-9 of Background Memorandum.)

CONFIDENTIAL

-2-

(b) The Treaty requires all nuclear materials and facilities under the jurisdiction of the parties to be used exclusively for peaceful purposes (unlike the NPT, which does not prohibit non-explosive military uses of nuclear material), and calls for IAEA safeguards on all such materials and facilities (unlike NPT safeguards, which do not attempt to detect the diversion to nuclear weapons of nuclear material furnished or used for other military purposes). Moreover, IAEA safeguards will be supplemented by the verification activities of the regional organization mentioned above.

3. The U.S. statement proposed as an integral part of our ratification will preserve our rights with regard to territorial claims of others and the freedom of action of the U.S., as well as the parties to the Treaty, to negotiate transit and transport privileges.

Our political interests in ratifying Additional Protocol II seem equally clear:

1. It would be a widely welcomed positive step in our relations with our Latin American allies, especially Mexico, which has been its chief promoter. (Our Ambassador to Mexico has strongly urged us to proceed promptly with this matter and Secretary Rogers has assured the Foreign Minister of Mexico that we would consider it expeditiously.)

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2. It would improve our posture in international forums dealing with arms control, giving substance to the support which we have consistently expressed for this initiative in

CONFIDENTIAL

-3-

Presidential and Vice Presidential speeches in the last Administration, in statements and votes at the UN General Assembly and at disarmament conferences, and during the negotiation of the NPT. (Resolutions supported by the United States and approved with no opposing votes were adopted at the Twenty-Second and Twenty-Third Sessions of the UN General Assembly, inviting the nuclear-weapon states to sign and ratify Additional Protocol II to this Treaty as soon as possible.) Such action would be particularly auspicious in this UN anniversary year, in which arms control is expected to be stressed.

3. It should have a timely, beneficial effect on public opinion here and abroad, as a demonstration of the Administration's interest in promoting arms control.

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would help emphasize to our Latin American allies the potential danger of Soviet Cuban ties.

CONFIDENTIAL

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CONFIDENTIAL

BACKGROUND MEMORANDUM ON  
ADDITIONAL PROTOCOL II TO THE TREATY FOR THE  
PROHIBITION OF NUCLEAR WEAPONS IN LATIN AMERICA

The Treaty for the Prohibition of Nuclear Weapons in Latin America (hereinafter called the Treaty, the full text of which is set forth at Tab B) is the first successful attempt to create a nuclear free-zone in a populated region of the world. It was created at the initiative of a number of states in Central and South America, a region in which nuclear weapons do not form a part of existing security arrangements. The Parties to the Treaty itself are limited to states located in this region. The basic undertaking of the Parties, contained in Article 1, is to use exclusively for peaceful purposes the nuclear material and facilities under their jurisdiction and to prohibit and prevent in their respective territories:

"(a) The testing, use, manufacture, production or acquisition by any means whatsoever of any nuclear weapons, by the Parties themselves, directly or indirectly, on behalf of anyone else or in any other way; and

"(b) The receipt, storage, installation, deployment and any form of possession of any nuclear weapon, directly or indirectly, by the Parties themselves, by anyone on their behalf or in any other way."

The Parties have also undertaken to refrain from engaging in, encouraging or authorizing, directly or indirectly, or in any way participating in the testing, use, manufacture, production, possession or control of any nuclear weapon. The Treaty excludes from the definition of nuclear weapon "an instrument that may be used for the transport or propulsion of the device... if it is separable from the device and not an indivisible part thereof." (Art. 5) Compliance with the Treaty is to be verified by the application of safeguards of the International Atomic Energy Agency on all nuclear activities in the states covered by the Treaty, and by a regional implementing organization which was established in September, 1969.

CONFIDENTIAL

CONFIDENTIAL

-2-

The Treaty is already in force for the sixteen states listed below (shown on the map at Tab A):

Barbados	Honduras
Bolivia	Jamaica
Costa Rica	Mexico
Dominican Republic	Nicaragua
Ecuador	Paraguay
El Salvador	Peru
Guatemala	Uruguay
Haiti	Venezuela

All other Latin American states have signed the Treaty except Cuba (whose present government has indicated that it will not sign) and Guyana (whose eligibility to sign is in dispute).

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The Treaty itself is not open for signature by states that are located outside Latin America, and such states are not eligible for membership in, or bound by the decisions of, the implementing organization.

The Protocols to the Treaty, on the other hand, are designed for adherence by States outside the region. Protocol I (Tab C) is designed to enable such States which have territories within Latin America (i.e. the United Kingdom, France, the United States and the Netherlands) to subject such territories to the provisions of the Treaty. Protocol II (Tab D) is designed for adherence by nuclear weapon states. It contains undertakings to respect the aims and provisions of the Treaty, not to contribute to its violation, and not to use or threaten to use nuclear weapons against the Latin American states for which the Treaty is in force. The statement made by the United States in connection with signature of Protocol II clarifies our understanding of these undertakings.

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\* Unlike the other states which have ratified the Treaty, Brazil did not waive the numerous preconditions set forth in Article 28 for its entry into force.

CONFIDENTIAL

-3-

Protocol I has been signed and ratified by the United Kingdom and signed by the Netherlands. It has not been signed by the United States or France. Protocol II has been signed and ratified by the United Kingdom and signed by the United States. It has not been signed by the Soviet Union, France or the Chinese Communists.

Before the U.S. signed Protocol II, a careful study of the implications and consequences of adhering to it was made by the Departments of State and Defense, the Joint Chiefs of Staff, the Atomic Energy Commission and ACDA. As a result of this study, it was recommended that our signature be accompanied by a statement clarifying our understanding of certain aspects of our undertaking. That statement (the full text of which appears at Tab E) is discussed below. It is recommended that the same statement be made an integral part of the U.S. ratification of Protocol II. (In that connection it should be noted that the United Kingdom incorporated the statement at Tab F in its instrument of ratification of Protocol I.)

#### The U.S. Statement on Signing Protocol II

The statement is divided into three sections. Section I of the statement has three paragraphs.

##### 1. Territory

The first paragraph of Section I provides:

"The United States understands that the Treaty and its Protocols have no effect upon — the international status of territorial claims."

Article 3 of the Treaty (which is incorporated by reference in Article 4 of Protocol II), provides that, for the purposes of the Treaty, the term "territory" shall include all space "over which the state exercises sovereignty in accordance with its own legislation." When the Treaty was

being negotiated, the U.S. had suggested the deletion of the language "in accordance with its own legislation," noting that "this language raises serious problems of territorial sovereignty which cannot realistically be resolved in the context of a nuclear free zone treaty." Several Latin American states claim extended territorial seas. Argentina, Ecuador, El Salvador, Panama, and Peru, for example, claim 200 mile territorial seas. The United States has never accepted such claims and holds them contrary to the rules of international law.

The United States statement assures that United States ratification of Protocol II cannot be construed as an acceptance by the United States of the unilaterally asserted territorial boundary claims of the parties to the Treaty.

## 2. Transit

The second paragraph of Section I of the United States statement deals with the question of the transit through the Treaty's zone of application of airplanes or ships of states that are not Parties while carrying nuclear weapons. It cites the negotiating history of the Treaty, which makes it clear that such rights and privileges of transit are not affected by the Treaty.

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CONFIDENTIAL

039

CONFIDENTIAL

-5-

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In the light of this background, the statement made by the United States on signing Protocol II read:

"The United States takes note of the Preparatory Commission's interpretation of the Treaty, as set forth in the Final Act, that, governed by the principles and rules of international law, each of the Contracting Parties retains exclusive power and legal competence, unaffected by the terms of the Treaty, to grant or deny non-Contracting Parties transit and transport privileges."

Both the statement in the Final Act and the United States statement preserve for the United States the right of innocent passage through the territorial sea (this being one effect of the phrase "governed by the principles and rules of international law"). The statement in the Final Act and the United States statement also preserve for the United States the privilege, if granted by the relevant Party, of port visits and overflights incidental to transit.

CONFIDENTIAL

040

-6-

Our experience since the Treaty's entry into force provides further assurance on this question. As shown below, the Treaty has now been in force for most of its present parties for an appreciable period of time:

<u>Date of Ratification</u>	<u>Country</u>
<u>1967</u> September 20	Mexico
<u>1968</u> April 22 June 14 August 20 September 23 October 23	El Salvador Dominican Republic Uruguay Honduras Nicaragua
<u>1969</u> February 11 February 18 March 4 March 19 April 25 May 23 June 26 August 25	Ecuador Bolivia Peru Paraguay Barbados Haiti Jamaica Costa Rica
<u>1970</u> February 6 March 13	Guatemala Venezuela

We have had no difficulties under the Treaty with respect to transit and transport privileges.

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### 3. Non-Use

As shown at page 1 of this memorandum, one of the undertakings by the Latin American parties to the Treaty is to prohibit and prevent in their respective territories the use of nuclear weapons. Accordingly, Protocol II, which is basically an undertaking by nuclear-weapon states to respect the Treaty and not to contribute to its violation, contains an undertaking "not to use or threaten to use nuclear weapons against the Contracting Parties" to the Treaty, which are defined to include only those Latin American states with respect to which the Treaty is actually in force. This undertaking does not extend to other nuclear powers, nor to non-parties to the Treaty nor to states outside the zone which have territories or possessions within it. It is made in reciprocity for the undertakings of the Contracting Parties under Article 1 of the Treaty which not only are designed to keep the area wholly free from nuclear weapons but also include an undertaking to refrain from "encouraging or authorizing, directly or indirectly, or in any way participating in the use...possession or control of any nuclear weapon."

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To make clear our understanding that this principle would extend to an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon state, the third paragraph of Section I of the U.S. statement reads as follows:

"As regards the undertaking in article 3 of Protocol II not to use or threaten to use nuclear weapons against the Contracting Parties, the United States would have to consider that an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon State, would be incompatible with the Contracting Party's corresponding obligations under article 1 of the treaty."

Assessment of the non-use undertaking at the time the Treaty was signed by the United States resulted in agreement within the government that it was acceptable in this particular case in view of (a) the special historic relationship which the United States has maintained with its hemispheric neighbours, an

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#### 4. Peaceful Nuclear Explosions

The Treaty does not preclude the carrying out of nuclear explosions for peaceful purposes within the territories of the parties, provided such explosions are carried out in accordance with the provisions of Article 18 (which establishes certain procedural requirements) "and the other articles of the Treaty, particularly articles 1 and 5" (Article 1 includes the basic undertakings, quoted at page 1 above, not to acquire, use, or possess nuclear weapons, and Article 5 defines "nuclear weapon" in a manner which covers the nuclear explosive devices that could be used in an explosion for peaceful purposes). During negotiation of the Treaty, Brazil took the position that the parties should be left free to manufacture their own nuclear explosive devices for peaceful purposes.

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a new paragraph 4 was added to Article 18 of the Treaty, permitting the Parties to accept the collaboration of third parties, such as the United States, in carrying out peaceful nuclear explosions. It is our position, which is shared by Mexico and (to the best of our knowledge and belief) by most of the other parties, that the final text of the treaty must be construed, like the NPT, to prohibit the manufacture or other acquisition of nuclear explosive devices even for peaceful purposes, and hence not to enable the parties to explode such devices by themselves. The only present party to the Treaty which has indicated a different view is Nicaragua (see Tab H). Brazil and Argentina, which are the only other countries that have indicated such disagreement, are not yet parties to the Treaty. None of the three is yet a party to the NPT.

To make clear our understanding of the Treaty on this point, the United States included the following paragraphs as Part II of its statement on signature:

"The United States wishes to point out again the fact that the technology of making nuclear explosive devices for peaceful purposes is indistinguishable from the technology of making nuclear weapons and the fact that nuclear weapons and nuclear explosive devices for peaceful purposes are capable of releasing nuclear energy in an uncontrolled manner and have the common group of characteristics of large amounts of energy generated instantaneously from a compact source. Therefore we understand the definition contained in article 5 of the treaty as necessarily encompassing all nuclear explosive devices. It is our understanding that articles 1 and 5 restrict accordingly the activities of the Contracting Parties under paragraph 1 of article 18.

"The United States further notes that paragraph 4 of article 18 of the treaty permits, and that

-10-

United States adherence to Protocol II will not prevent, collaboration by the United States with Contracting Parties for the purpose of carrying out explosions of nuclear devices for peaceful purposes in a manner consistent with our policy of not contributing to the proliferation of nuclear weapons capabilities. In this connection, the United States reaffirms its willingness to make available nuclear explosion services for peaceful purposes on a non-discriminatory basis under appropriate international arrangements and to join other nuclear-weapon States in a commitment to do so."

The last sentence of this statement was written before negotiation of the NPT was completed, and accordingly neither reflects the fact that in that Treaty we did join other nuclear-weapon states in such a commitment, nor indicates the terms and conditions of such commitment. Thus it appears desirable to revise this sentence in the statement we make upon ratification of Protocol II. A suggested revision follows:

"In this connection, the United States calls attention to Article V of the Nuclear Non-Proliferation Treaty, under which it joined in an undertaking to take appropriate measures to ensure that potential benefits of peaceful applications of nuclear explosions would be made available to non-nuclear weapon states party to that treaty, and reaffirms its willingness to extend such undertaking, on the same basis, to states precluded by the present treaty from manufacturing or acquiring any nuclear explosive devices."

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-11-

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The particular wording suggested is designed to:

- (1) update our statement on signature by making clear that we have already joined others in a commitment to ensure that nuclear explosion services are made available on a non-discriminatory basis;
- (2) make clear that the basis on which we would be willing to make the explosion services available is the same as that under the NPT;\*

\*Which provides (1) that "Each party to the treaty undertakes to take appropriate means to ensure" that "the potential benefits from any peaceful applications of nuclear explosions" will be made available "in accordance with this Treaty" (thus precluding any transfer of nuclear explosive devices or access to information that would be of assistance in their manufacture); (2) that they will be made available "under appropriate international observation and through appropriate international procedures...on a non-discriminatory basis;" (3) that "the charge for the explosive devices used will be as low as possible and exclude any charge for research and development;" and (4) that such benefits shall be obtainable either pursuant to bilateral agreements or "pursuant to a special international agreement or agreements /negotiations on which are to commence as soon as possible after the entry into force of the NPT/ through an appropriate international body with adequate representation of non-nuclear-weapon states."

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- (4) limit our expression of willingness to extend the NPT undertaking to those parties to the Latin American Treaty who consider themselves bound by our interpretation of Article 18 of that Treaty.

Regardless of the form of the U.S. statement, it is clear that neither the Treaty, nor our ratification of Protocol II, would prevent the United States from conducting the nuclear explosions that would be involved in the nuclear excavation of an Atlantic-Pacific Interocannic Canal. If such excavation were conducted in the territory of a party to the Treaty, however, the procedural requirements set forth in paragraphs 2 and 3 of Article 18 would of course have to be met. (Neither Panama nor Colombia is yet a party to the Treaty, although both have signed it.\*). In this connection, it should be noted that the provisions in paragraph 3 of Article 18 regarding observation of preparations and "unrestricted access in the vicinity of the site of the explosion" for the International Atomic Energy Commission and the personnel from the regional implementing organization would have to be read in the light of the basic purpose of the Treaty to prevent the proliferation of nuclear weapons capabilities. Access could not be such as to disclose the technology involved in the manufacture of the nuclear explosive devices used by a nuclear-weapon state in providing the explosion service. That the United States understands paragraph 3 of Article 18 in this fashion is demonstrated by the reference in Part II of the United States statement to our goal of carrying out any such explosions

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\*They have both also signed the NPT.

CONFIDENTIAL

-13-

in a manner consistent with the policy of "not contributing to the proliferation of nuclear weapons capabilities.\*

### 5. Protocol I Territories

As noted in the section above on the "non-use" undertaking in Protocol II, that undertaking applies only to the "Contracting Parties" to the Treaty itself, a term that does not include territories or possessions in the area that are brought under the Treaty by ratification of Protocol I. Thus territories such as Surinam and the Netherlands Antilles and British Honduras could be subjected to all of the obligations of a party to the Treaty without getting the benefit of the "non-use" undertaking under Protocol II. In signing Protocol II, both the United States and the United Kingdom indicated their desire to correct this inequity (which was probably a drafting oversight) by extending their "non-use" undertakings to such territories. Thus Section III of the U.S. statement on signature reads as follows:

"The United States also wishes to state that, although not required by Protocol II, it will act with respect to such territories of Protocol I adherents as are within the geographical area defined in paragraph 2 of article 4 of the treaty in the same manner as Protocol II requires it to act with respect to the territories of Contracting Parties."

### Other Matters

While it is believed that the preceding discussions covers the principal matters that must be considered in connection with U.S. ratification of Protocol II, several others should be noted:

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\*Also by the earlier U.S. Note at Tab G.

CONFIDENTIAL

CONFIDENTIAL

-14-

(a) Zone of Application

(b) THE CANAL ZONE  
Panama has signed, but not yet ratified the Treaty. During negotiation of the Treaty, the Preparatory Commission was officially advised by the United States that "From the U.S. point of view, we would be agreeable to inclusion of the Panama Canal Zone" under the Treaty, "although of course the well-established transit rights would not be affected."\* To

\*Letter dated December 10, 1965 from ACDA Director Foster to Chairman Garcia Robles.

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Panama ratifies the Treaty, the United States could assert that our ratification of Protocol II, coupled with our earlier expressions of intent with respect to the Canal Zone, constituted consent to inclusion of the Canal Zone under the Treaty, subject to established transit rights. That, together with Panamanian ratification of the Treaty, would leave no doubt (under either the U.S. or Panamanian legal positions) that the Treaty was applicable to the Canal Zone.

(c) Duration and Denunciation

Protocol II makes the provisions in Article 29 of the Treaty, on duration and denunciation, applicable to that Protocol. Article 29 provides that the Treaty shall remain in force indefinitely, but that any Party may denounce it by giving three months' advance notice that, in its opinion, "there have arisen or may arise circumstances connected with the content of the Treaty or of the annexed Additional Protocols I and II which affect its supreme interests and the peace and security of one or more of the Contracting Parties." (The three months' notice requirement would not apply to an exercise of our right under international law, discussed under "Non-Use" above, to consider ourselves relieved of our undertakings under Protocol II as against a party responsible for a material breach of its own obligations under the Treaty.)

(d) The Soviet Position

— The Soviets have not signed Protocol II, and have indicated considerable hesitancy to do so. The reasons for this hesitancy appear to include the following:

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-16-

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While we would consider Soviet adherence to Protocol II highly desirable, we do not believe it should be considered a sine qua non of our own adherence to that Protocol. This is so because:

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-17-

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### CONCLUSION

Except for the proposed revision of our statement on peaceful nuclear explosions, all of the problems discussed above were carefully considered in connection with the U.S. decision to sign Protocol II to the Treaty. It is believed that the review of these problems in this memorandum indicates that none of them is so serious or unmanageable as to offset the clear advantages to the United States of proceeding with ratification of Protocol II and incorporating in the instrument of ratification the statement described above.